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OCT 23 1905

JAMES H. McKENNEY,

No. [redacted].134

In the Supreme Court of the United States.

NO. — OCTOBER TERM, 1905.

ERIE RAILROAD COMPANY,
Petitioner,
vs.
ERIE & WESTERN TRANSPORTATION COMPANY, CLAIMANT OF THE PROPELLER CONEMAUGH,
Defendant.

HARVEY D. GOULDER,
Cleveland, Ohio,
Proctor for Defendant.

BRIEF FOR THE ERIE & WESTERN TRANSPORTATION COMPANY.

Mere reading of the libel (Rec. 2) will show that neither the petition nor the brief in support correctly states the case made in the lower courts; and the briefest examination of the opinion of the Circuit Court of Appeals will disclose that there are no questions of general importance involved in this case made by the pleadings; further, that the only issues in this case, and all questions of law arising thereon, *in the form presented*, have been definitely and finally adjudicated upon adversely to petitioner's claim by this Court on the *same facts* and between the *same interests*.

The present case does not grow out of the collision of Oct. 21, 1891, between the propellers New York, owned by peti-

tioner's incorporate predecessor, and the Conemaugh, owned by this defendant, but is sought to be predicated on the decree entered in a cause arising out of a collision of that date, which decree was ordered by this Court,

176 U. S., 187,

and approved by this Court,

178 U. S., 317,

and finally re-affirmed by this Court,

189 U. S., 363;

and is in endeavor, through misconception by counsel of issue, fact, decision and law, to correct, or, more properly, subvert, the decision of this Court in the previous causes.

There is no conflict, no new doctrine, no modification of accepted law, no question reading beyond the particular case; no error in the particular case.

That this is plain fact, not assertion, is matter of record. As matter of convenience, we quote the statement of the court below in this case:

> "The prior proceedings in admiralty upon which the libel and decree rest the right of recovery are notable for their course and duration, and a summary is needful for understanding of the theory on which recovery was sought and allowed. As the appellant's brief well and concisely recites these facts (approved on behalf of the appellee as 'substantially correct') such recital is incorporated in this statement, as follows:
>
> 'On the 21st day of October, 1891, a collision occured in the Detroit River between the propellers New York, owned by the appellee's predecessor the Union Steamboat Company, and the Conemaugh, owned by the appellant. The collision resulted in the sinking of the Conemaugh with great damage to her cargo of miscellaneous package freight, and in some small damage to the New York.
>
> 'November 11, 1891, appellant, as owner of the Conemaugh and bailee of her cargo, filed libel in the United States District Court for the Eastern District of Michigan against the New York. The Union Steamboat Company answered for the New York, denying all liability, and

attributing the disaster solely to the fault of the Conemaugh; also setting up the damage sustained by the New York as about $3,000. Subsequently the Union Steamboat Company filed a cross libel for the physical damage to the New York, but no process was issued and the decree dismissing the cross libel was not appealed from by the Union Steamboat Company.

'On hearing both steamers were held at fault: 53 Fed., 553. Rehearing was had, resulting in the New York being held solely in fault. At this stage, the British and Foreign Marine Insurance Company, Limited, the Insurance Company of North America, the Union Insurance Company, and the Marine Insurance Company, as insurers on parts of the Conemaugh's cargo, having paid the loss, intervened for their interest, alleging that the sole fault lay with the New York.

'On January 25, 1895, the parties stipulated that the damage sustained by the New York amounted at that time to $3,391.19. The other damages having been determined, decree was entered in favor of appellant for its own damage, and as trustee for the cargo damage, the decree providing, however, that the amount allowed for cargo insured by the intervening companies be paid to them.

'The owner of the New York appealed. The United States Circuit Court of Appeals for the Sixth Circuit reversed the decree of the District Court and held the propeller Conemaugh solely at fault, dismissed the libel and the petitions of the insurers, and ordered decree against this appellant *in personam* for the New York's damage: 82 Fed., 819. Petition for rehearing was denied.

'This appellant and the intervening insurers petitioned the Supreme Court for writ of *certiorari*. The petition was granted, and on hearing both vessels were held at fault: 176 U. S., 187.

'Mandate thereupon issued to the District Court, directing a decree in accordance with the opinion. Decree was entered in the District Court, dividing the damages sustained by the steamers, which, as of July 3, 1896, required the owner of the New York to pay to the appellant herein in its own right $13,083.33, with interest at seven per cent from that date until paid, and required the New York to pay the entire cargo damage. The insurers on cargo which had already intervened were decreed $19,841.56. The balance of the cargo damage, amounting to $19,627.67 was decreed to appellant as trustee.

'The owner of the New York then petitioned the Supreme Court for writ of mandamus, directed to the

District Court for the Eastern District of Michigan, to require said Court to enter a decree which would divide the damage to cargo equally between the New York and the Conemaugh. Writ in the alternative was issued, answered, and on hearing the petition was dismissed, as the decree entered was in accordance with the mandate: 178 U. S., 317.

'Although the application to the Supreme Court was to enter decree which would divide the cargo damage *equally* to the two vessels, the question of *recoupment* was argued. The Supreme Court said, among other things, that no question of *recoupment* was presented to or passed upon by them in deciding the case, and that *if* the District Court erred in not allowing it, it was matter for appeal.

'Thereupon the owner of the New York appealed from the decree so entered. Appellant [here] moved dismissal of the appeal on the ground generally that the Circuit Court of Appeals was without jurisdiction to review in any manner the decree as it had been entered only in conformity with the mandate, and so was the decree of the Supreme Court. The motion to dismiss was denied: 104 Fed., 561.

'The appeal was then argued and the decree below affirmed: 108 Fed., 102.

'The Union Steamboat Company then (in its turn) petitioned the Supreme Court for a writ of *certiorari*, which was granted. The cause was again tried in the Supreme Court and the decree which had been entered by the District Court on its mandate was affirmed: 189 U. S., 363.

'While in the Supreme Court the last time the insurers who had covered that portion of the cargo for which this appellant had continued thereto as trustee, intervened.

'May 16, 1901, after dismissal of the petition for mandamus by the Supreme Court, the owner of the New York paid so much of the cargo damage as the decree required to be paid to the intervenors, and after the affirmance of the decree by the Supreme Court the remaining damage and costs were paid as provided by the decree, and the case closed.' "

The Court then continues as to the present litigation, saying:

"Objections to the libel, for want of jurisdiction and of *res adjudicata*, were raised by exceptions, and renewed

by the answer. The answer further sets up, by way of defense, the bill of lading under which the cargo of the Conemaugh was carried, which contained provisions (1) giving to the carrier the benefit of insurance on the cargo —such insurance being effected and the loss paid to the shipper—and provided against liability therefor, unless (2) written claim was made within thirty days, and (3) action was brought for any loss within three months; and it is averred that no claim was so made or action brought.

"No issues of fact arose, as a stipulation was filed which brought in the printed records in the prior proceedings as evidence, and admitted the averments of the answer respecting the terms of the bill of lading, fact of insurance and payment of loss to the shipper, and that no claim was made by shipper or insurer, or suit brought against the Conemaugh for the cargo loss, within the limitations of the bill of lading."

The libel was *in rem* against the Conemaugh, and stated as its sole basis that petitioner was not permitted in the former cause to recoup *one-half* of the damage to cargo. No other basis, no other or further ground as a basis of lien against the Conemaugh or claim against her owner was set up or presented; that is, petitioners sole contention is that under the general maritime law as administered by the admiralty in this country, *all* damage sustained in collision *must be* divided equally between the parties found at fault, *irrespective of any conditions, claim made or the state of the pleadings.*

The present petitioner brought the *same* question on the *same* facts into this Court on application for mandamus (178 U. S., 317), and later, after an adverse ruling by the Circuit Court of Appeals for the Sixth Circuit (108 Fed. 102), again brought the *same* question on the *same* facts before this Court (189 U. S., 363), and when its contention was repudiated by this Court, paid up the balance of the damages as required by the thrice affirmed decree, then instituted an original proceeding *in rem* in another district, setting up the history of the previous litigation, *without further facts or any other basis of claim.*

The district court, without consideration and conceiving that it was only required that the relief should be asked, *entered decree;* the Circuit Court of Appeals for the Seventh Circuit reversed this without announcing any doctrine at variance with this Court's announcements in the same case on the same facts.

The Circuit Court of Appeals held:

1. That defendant's general contention that a libel for contribution would not lie was not well founded.

2. "The general rule of admiralty, preserved from the ancient text of the law, is well settled in collision cases, that each vessel in fault is equally liable for injuries arising and must bear the damages equally, without reference to the degree of fault."

3. That the right to recover the

> "entire cargo damage against the New York, irrespective of the fault of the Conemaugh, is there [189 U. S., 363] settled."

4. That admiralty may enforce contribution against one not involved in a degree so as to equalize the burden, but cannot *in contravention of the express terms of a former decree enforce equalization.*

5. That in this case the apparent inequalities of burden

> *"arise out of the conduct and results of the litigation in reference to such claim of cargo damage, and not out of the collision,* and so treated are not cognizable in admiralty, apart from a primary cause to establish the respective rights and liabilities of the parties concerned."

6. And finally, and as the real basis for the whole, they say they cannot find basis for any relief

> *"under the circumstances stated in the libel."* (Op. 11.)

There is no denial of any established rule or principle, but simply the declaration that the libel does not present any cause not already adjudicated in the other case, a declaration supported by the plain wording of the label and the decision of this Court in the other case.

If petitioner's predecessor had seen fit to place itself in position to claim recoupment in the previous cause, defendant would have been in position to show that by a previous *valid* contract with the owner of the goods damaged, defendant was entitled, in the event of damage, to the *benefit* of any insurance, being the conceded fact that all of the goods damaged were insured and insurance paid to the full amount of the damage, whether

this Court would have held that by reason of the contract giving defendant the *benefit* of the insurance its payment to the owner of the goods was full *satisfaction* of the damage, and, therefore, deny the cargo any recovery; or, would have held that such payment of insurance money (*belonging to defendant under its contract with the owner of the goods*), to the owner of the goods, was *satisfaction* of the damage only as to defendant, and, therefore, limited the recovery against the New York, (on account of cargo damage) *to one-half*, is now immaterial.

Defendant in *the previous cause* was never in a position to present its defense, and under the libel in this cause was not called upon to present this defense (and others), although it did set them up in special answer to the libel. The District Court did not consider them; the Circuit Court of Appeals found no occasion to do so, as petitioner simply presented in its libel the same ground it had urged to the District Court for the Eastern District of Michigan on the coming down of the mandate, to this Court in the mandamus proceedings, to the Sixth Circuit Court of Appeals on appeal, and again to this Court when that cause was last here on *certiorari;* and on each occasion petitioner's position,—*not the law*,—have been found wanting.

Petitioner is still in the same position, *and the law is unchanged.*

We respectfully submit that five uniform, adverse adjudications on a contention presenting nothing of conflict, general import or even error, should suffice, and the petition be denied.

Respectfully submitted,

HARVEY D GOULDER.

Proctor for Defendant.

S. H. HOLDING,
F. S. MASTEN,
Counsel.

Cleveland, Ohio, October 12, 1905.